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Franchise Law

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TABLE OF CONTENTS

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I. INTRODUCTION

Texas courts continue to examine frequently-litigated franchising issues, and this Survey period produced a "blockbuster" development concerning joint-employer liability in the franchise context: the imposition of vicarious liability on the franchisor for labor law violations asserted by a franchisee's employees against the franchisee. In response to the National Labor Relations Board's recent decision to classify franchisors as joint-employers with their franchisees, the Texas Legislature passed a bill restricting such classification only to situations where the franchisor exercises direct control over those employees beyond what is necessary to protect the franchisor's brand. Other Texas cases during this Survey period provide guidance for franchisors on a number of procedural issues—including personal jurisdiction, choice-of-law, arbitration, and jury waiver provisions—and courts also continue to define the contours of common law and statutory claims in the unique franchising model.

II. PROCEDURE

A. Personal Jurisdiction

Two recent cases considered questions of personal jurisdiction in the context of minimum contacts with the State of Texas. In *Great American Food Chain, Inc. v. Andreottola*, the plaintiff was a Nevada company with its principal place of business in Texas that had hired Andreottola, a Georgia resident, as its president and director.[1] Andreottolla later allegedly "sought and obtained a position with defendants American Franchise Capital and Apple Central" (AFC defendants), who were residents of Delaware, Connecticut, and Kansas.[2] The plaintiff sued Andreottola and the AFC defendants in Texas for, *inter alia*, breach of contract and tortious interference with an existing contract.[3] After removing the case to federal court, the AFC defendants then moved to dismiss the case for lack of personal jurisdiction.[4]

The U.S. District Court for the Northern District of Texas focused on specific personal jurisdiction, considering whether the non-resident defendants had established minimum contacts in Texas by either (1) purposefully availing themselves of the benefits of conducting activities in Texas; or (2) purposely directing their activities at residents in Texas such that the alleged injuries arose from those activities.[5] The only alleged contacts that the AFC defendants had with Texas were the effects of the AFC defendants' alleged tortious interference between the plaintiff and Andreottola.[6] However, "in a commercial tort situation[,] the place of the

1. Great Am. Food Chain, Inc. v. Andreottola, No. 3:14-CV-1727-L, 2015 WL 493758, at *1, *3 (N.D. Tex. Feb. 4, 2015).
2. *Id.*
3. *Id.* at *1.
4. *Id.*
5. *Id.* at *2.
6. *Id.*

injury will usually be deemed to be the place where the critical events associated with the dispute took place."[7] In this particular case, the court found that none of the crucial events among the defendants occurred in Texas.[8] Moreover, the defendants must have purposefully directed their activities to Texas to establish minimum contacts.[9] Here, Andreottola's contract was set to be performed in Georgia, and the injurious acts (i.e., the AFC defendants' negotiations with Andreottola) did not take place in Texas.[10] The district court held these facts were "insufficient to confer specific jurisdiction" and dismissed the case.[11]

Great American serves as a reminder that personal jurisdiction cannot be established where the only minimum contacts stemmed from the plaintiff's residence and suffering of harm in the forum.[12] Instead, the defendant must have purposefully availed itself of the benefits of, or directed its activities to, the forum state.[13]

SGIC Strategic Global Investment Capital, Inc. v. Burger King Europe GMBH (*SGIC I*) presents another example of minimum contacts that will not confer personal jurisdiction.[14] In *SGIC I*, the plaintiffs (various interconnected entities and their shareholder) owned and operated Burger King franchises in Germany through various franchise agreements, and the franchise fee payments were personally guaranteed by plaintiff Christian Groenke (Groenke)—the sole shareholder of SGIC Strategic Global Investment Capital, Inc. (SGIC).[15] The plaintiffs alleged that Burger King induced Groenke to purchase shares of a certain corporation "in exchange for a development agreement and the opportunity to purchase [several] Burger King restaurants."[16] But Burger King later terminated the agreement and sold the restaurants to others.[17] When the plaintiffs' non-performing restaurants fell into bankruptcy, Groenke attempted to sell his shares in plaintiff SGIC to another buyer. Plaintiffs alleged that the deal fell through due to Burger King's contacts with the buyer.[18] While Burger King sued Groenke in Texas for franchise fees based on his personal guaranty, the plaintiffs filed a separate lawsuit against Burger King in Texas for tortious interference with a contract.[19] Burger King responded by moving to dismiss for lack of personal jurisdiction and on

7. *Id.* at *5 (quoting Jobe v. ATR Mktg., Inc., 87 F.3d 751, 753 n.3 (5th Cir. 1996)) (internal quotation marks omitted).
8. *Id.*
9. *Id.*
10. *Id.* at *3, *7.
11. *Id.* at *7.
12. *Id.* at *5 (citing Revell v. Lidov, 317 F.3d 467, 473 (5th Cir. 2002)).
13. *Andreottola*, 2015 WL 493758, at *6.
14. SGIC Strategic Glob. Inv. Capital, Inc. v. Burger King Europe GMBH, No. 3:14-CV-3300-B, 2015 U.S. Dist. LEXIS 89501 (N.D. Tex. July 9, 2015) [hereinafter *SGIC I*]. Haynes and Boone served as co-counsel for Burger King in this matter.
15. *Id.* at *2–3.
16. *Id.* at *3.
17. *Id.*
18. *Id.*
19. *Id.* at *4.

forum non conveniens grounds, and plaintiffs sought leave to conduct jurisdictional discovery.[20]

The U.S. District Court for the Northern District of Texas agreed with Burger King, finding that the plaintiffs "failed to make a preliminary showing of specific jurisdiction."[21] The district court, however, also noted that "[v]oluntarily filing a lawsuit may constitute purposeful availment and subject a party to personal jurisdiction in another lawsuit when the lawsuits arise from the same general transaction."[22] The plaintiffs argued that Burger King had submitted to personal jurisdiction in Texas by filing a lawsuit against Groenke, which Groenke argued was related to the present suit because he would never have entered the franchise agreement if not for Burger King's promises regarding the development agreement.[23] The district court, however, rejected plaintiffs' argument, finding that the present suit concerned Burger King's "alleged tortious interference with the sale of" Groenke's interest in SGIC—not Burger King's alleged actions regarding failed promises in the development agreement.[24] Because the two lawsuits did not arise from the same transaction, the district court ruled that Burger King had not purposefully availed itself of Texas's jurisdiction.[25]

SGIC I makes clear that the mere act of filing a separate lawsuit in a forum state does not, in itself, automatically confer jurisdiction upon that party in a different lawsuit. Even if that lawsuit stems from a related set of facts, both lawsuits *must* arise from the same general transaction within that set of facts.

B. Choice of Law

Gator Apple, LLC v. Apple Texas Restaurants, Inc. involved a choice-of-law provision dictating which state law should be applied to a breach of contract claim.[26] Gator Apple assumed a Florida franchise agreement with Applebee's. The agreement contained a choice-of-law provision prohibiting either party from soliciting the other's former employees within six months of their previous employment without first obtaining written consent.[27] In an unrelated transaction, Apple Texas also became a franchisee of Applebee's in North Texas.[28] Eventually, Gator Apple hired five former employees of Apple Texas without first obtaining a letter of release from Apple Texas.[29] Apple Texas, acting as a third-party beneficiary of Gator Apple's franchise agreement, sued Gator Apple for

20. *Id.*
21. *Id.* at *8, *10.
22. *Id.* at *8.
23. *Id.* at *8, *10.
24. *Id.* at *10–11.
25. *Id.*
26. Gator Apple, LLC v. Apple Tex. Rest., Inc., 442 S.W.3d 521, 530–31 (Tex. App.—Dallas 2014, pet. denied).
27. *Id.* at 525–26.
28. *Id.* at 526.
29. *Id.* at 528.

breach of contract for violations of the employment provision of Gator Apple's franchise agreement.[30] Apple Texas then moved for summary judgment, which the trial court granted and found, *inter alia*, that Kansas law governed the franchise agreement.[31] After the trial court entered final judgment for Apple Texas, Gator Apple filed a motion for a new trial. The trial court overruled the motion, and Gator Apple appealed.[32]

The Dallas Court of Appeals found that the trial court correctly applied Kansas law to the breach of contract claim as well as to the franchise agreement's liquidated damages provision.[33] First, the choice-of-law provision stated that Kansas law applied to the construction of the agreement and all questions arising with reference to it.[34] The court of appeals found that this provision, coupled with its stated purpose to ensure that all Applebee's franchise agreements be "uniformly interpreted," indicated the parties' "clear intent for the franchise agreement to be uniformly interpreted" across all similar franchise agreements with Applebee's.[35] Because the question of whether the contract was breached arose with reference to the agreement, the breach of contract claim was covered by the choice-of-law provision, and Kansas law applied to the claim.[36]

Second, the court of appeals considered Gator Apple's argument that, "even if the parties intended for Kansas law to apply to the performance of the franchise agreement," a choice-of-law analysis required the application of Texas law, particularly because Kansas law conflicted with Texas policy regarding the liquidated damages provision.[37] The court of appeals rejected this argument and concluded that the mere fact that the application of one state's law may lead to a different result does not mean it is contrary to the fundamental policy of the forum state.[38] Instead, the court of appeals turned to the Restatement to evaluate the express choice-of-law provision.[39] According to § 187(1) of the Restatement, a contractual choice-of-law provision must be applied unless the specific issue is one that could be resolved by an explicit provision.[40] Because the enforceability of a contract cannot be resolved by an explicit provision, the court of appeals found that the exception in § 187(1) did not apply.[41] Section 187(2) also requires that a contractual choice-of-law provision be applied unless either "the chosen state has no substantial relationship to the parties" or the application of the chosen state's law would be "contrary to

30. *Id.* at 529.
31. *Id.*
32. *Id.* at 529–30.
33. *Id.* at 534–35.
34. *Id.* at 530.
35. *Id.* at 531.
36. *Id.*
37. *Id.*
38. *Id.* at 532.
39. *Id.*
40. *Id.*
41. *Id.*

the fundamental policy of a state which has a materially greater interest."[42] The court of appeals found that Kansas had "a substantial relationship to the parties and the transaction" because Applebee's was headquartered in Kansas when Gator Apple entered the franchise agreement and Applebee's had to perform its obligations under the franchise agreement in Kansas.[43] By contrast, Texas had "no relationship with the franchise agreement at the time it was signed."[44] Gator Apple urged the court of appeals to consider the relationship that Texas had to the case given that Gator Apple hired Apple Texas employees.[45] But the court of appeals found no authority to support the argument that the court should consider the facts existing at the time of breach.[46] Thus, the court of appeals concluded that Kansas law applied to the breach of contract claim because no state had a more significant relationship at the time the contract was executed.[47]

Gator Apple reflects the importance of *timing* as it relates to a choice-of-law provision. Although a party's actions may involve the forum state after the execution of an agreement, the analysis focuses on the facts at the time the parties signed the contract—"contracts should be governed by the law the parties had in mind when the contract was made."[48]

C. Forum Selection

Pritchett v. Gold's Gym Franchising, LLC concerned the issue of whether a forum selection clause was incorporated by reference into a guaranty agreement.[49] In this case, Pritchett's daughter and her husband, on behalf of their corporation, entered into a franchise agreement with Gold's Gym for a Georgia location, which all three individuals, including Pritchett, personally guaranteed.[50] The parties later entered into a new franchise agreement, which contained a provision consenting to the jurisdiction of federal courts in Dallas County, Texas.[51] Pritchett's son-in-law, as president of the corporation, signed the new franchise agreement, and all three individuals signed the guaranty agreement (which Pritchett later denied).[52] Gold's Gym later filed suit against Pritchett, his daughter, and her husband for failure to pay franchise fees owed.[53] Asserting that he had no contacts with Texas, Pritchett filed a special appearance, but the

42. *Id.* at 532–33 (quoting Restatement (Second) of Conflict of Laws § 187(2)(a), (b) (Am. Law. Inst. 1989)).
43. *Id.* at 533.
44. *Id.* at 534.
45. *Id.*
46. *Id.*
47. *Id.* at 534–35.
48. *Id.* at 534 (quoting Sonat Expl. Co. v. Cudd Pressure Control Inc., 271 S.W.3d 228, 236 (Tex. 2008)).
49. Pritchett v. Gold's Gym Franchising, LLC, No. 05-13-00464-CV, 2014 WL 465450, at *3–4 (Tex. App.—Dallas Feb. 4, 2014, pet. denied) (mem. op.).
50. *Id.* at *1.
51. *Id.*
52. *Id.* at *4–5.
53. *Id.* at *2.

trial court denied the special appearance.[54]

The Dallas Court of Appeals affirmed the trial court's order, finding that Pritchett was subject to the forum selection clause because of the guaranty agreement.[55] Because a forum selection clause is *prima facie* valid, a party opposing the clause's enforcement bears a heavy burden of arguing against enforcement.[56] Pritchett argued that the forum selection clause did not apply to him because he did not sign the franchise agreement containing the forum selection clause.[57] The forum selection clause, however, explicitly applied to the "Owners" named in an attached exhibit to the agreement, which listed Pritchett's name.[58] Also, the guaranty agreement stated that the "Guarantors" (which the franchise agreement had defined as any "Owner" having a certain ownership interest in the corporation) "agree[d] to be personally bound by . . . each and every provision in the [franchise] [a]greement."[59] Pritchett initialed the ownership list and signed the guaranty agreement.[60] The court of appeals found that the language of the guaranty agreement reflected the parties' intent for the franchise agreement and forum selection clause to be part of the guaranty agreement.[61] Because the forum selection clause was incorporated by reference, it made no difference that Pritchett did not sign the franchise agreement containing the forum selection clause.[62] As a named "Owner," Pritchett was bound by the forum selection clause and waived any objection.[63] While Pritchett argued that his signature on the guaranty agreement was forged, the court of appeals adhered to the trial court's finding that Pritchett signed the agreement and denied the special appearance.[64]

Pritchett serves as a reminder that a non-signatory to a franchise agreement may still be bound if the party has signed a guaranty agreement incorporating the franchise agreement by reference.[65] Thus, even an unsigned document may become part of the contract if the language reflects the parties' intent to do so.[66]

In the *SGIC I* case, discussed above for its personal jurisdiction issues, the U.S. District Court for the Northern District of Texas also considered whether it could and should assert jurisdiction over the defendant in light

54. *Id.*
55. *Id.* at *6.
56. *Id.* at *3 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 17, 19 (1972)).
57. *Id.* at *4.
58. *Id.*
59. *Id.* at *4–5.
60. *Id.*
61. *Id.* at *5.
62. *Id.*
63. *Id.* at *6.
64. *Id.*
65. *See id.* at *6 (citing *In re* 24R, Inc., 324 S.W.3d 564, 567 (Tex. 2010)).
66. *See id.* at *5 (citing One Beacon Ins. Co. v. Crowley Marine Servs., Inc., 648 F.3d 258, 267 (5th Cir. 2011); *In re 24R, Inc.*, 324 S.W.3d at 567).

of a forum selection clause (*SGIC II*).[67] The franchise agreements at issue contained a forum selection clause that named Munich, Germany as the forum for the litigation of any disputes between the parties.[68] After Burger King filed suit against Groenke in Texas for franchise fees due under a guaranty agreement with Groenke, Groenke and the other plaintiffs sued Burger King in the same court for tortious interference with a contract.[69] Burger King then filed a motion to dismiss for lack of jurisdiction and *forum non conveniens* based on the forum selection clause contained within the franchise agreements.[70]

The district court examined the forum selection clause under the doctrine of *forum non conveniens*, the legal mechanism for cases in which the transferee court is not within the federal court system.[71] The district court considered the motion under the following guidelines: (1) a plaintiff's choice of forum is irrelevant to the court's analysis; (2) the court should disregard the parties' private interest arguments; and (3) if "'a party has disregarded the forum selection clause and filed suit in a different forum,' a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules' which may, in some circumstances, affect a district court's evaluation of the public interest factors."[72] Similar to its previous jurisdictional analysis, the district court found that Burger King did not intend to waive its right to enforce the forum selection clause by filing suit against the plaintiff in Texas.[73] Although the franchise agreements contained a forum selection clause, the guaranty contract under which Burger King sued Groenke did not contain that clause.[74] Because Burger King sued Groenke under that distinct guaranty agreement, the district court held that Burger King could not have intended to waive its right to enforce the forum selection clause in the franchise agreements.[75]

Further, the district court found that the forum selection clause applied to all plaintiffs even though only plaintiff Groenke signed the franchise agreements.[76] "First, plaintiffs SGIC and GRIL directly benefitted from [Burger King's] performance under the franchise agreements" with Groenke.[77] Second, the plaintiffs' claims could be determined only by referring to certain provisions of the franchise agreements, so plaintiffs SGIC and GRIL could not selectively rely on those parts of the franchise agreements without being subject to the agreements' forum selection

67. SGIC Strategic Glob. Inv. Capital, Inc. v. Burger King Europe GMBH, No. 3:14-cv-03300-B, slip op. at 8 (N.D. Tex. Aug. 26, 2015) [hereinafter *SGIC II*].
68. *Id.* at 2.
69. *Id.* at 4; *SGIC I*, No. 3:14-CV-3300-B, 2015 U.S. Dist. LEXIS 89501 (N.D. Tex. July 9, 2015).
70. *SGIC II*, No. 3:14-cv-03300-B, slip op. at 1.
71. *Id.* at 8 (citing Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex., 134 S. Ct. 568, 579–80 (2013)).
72. *Id.* at 10.
73. *Id.* at 20.
74. *Id.* at 20–21.
75. *Id.* at 21.
76. *Id.* at 21, 23.
77. *Id.* at 23.

clause.[78] Finally, the district court held that Germany's interest in resolving local disputes and the district court's avoidance of issues regarding conflict of laws or the application of foreign law weighed against keeping the suit in the Texas forum.[79] Accordingly, the district court granted Burger King's motion to dismiss.[80]

SGIC II presents another example of the strong tendency to enforce a valid and agreed forum selection clause. As with *Pritchett*, *SGIC II* shows that even non-signatories to a franchise agreement may be bound by any of its forum clauses, especially when the non-signatories have directly benefited from the other party's performance under the agreement.

D. Class Actions

In *Aguayo v. Bassam Odeh, Inc.*, plaintiffs were current or former fast food employees at the Jack in the Box restaurant owned and operated by the defendants.[81] The defendants also had ownership interest in other companies that owned and operated Jack in the Box and Qdoba franchises.[82] The plaintiffs alleged that the defendants regularly required them to work more than 40 hours per week without overtime compensation by falsely crediting the hours to fictitious employees and threatening to have the plaintiffs deported if they complained.[83] The plaintiffs filed suit under the Fair Labor Standards Act (FLSA) and asserted claims on behalf of similarly situated fast food employees who had worked for the defendants in the past three years in Texas and Louisiana and who were not paid for hours worked overtime.[84]

The U.S. District Court for the Northern District of Texas examined the presented evidence according to the following evidentiary requirements for the class certification of similarly situated aggrieved individuals:

> (1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist; (2) those aggrieved individuals are similarly situated to the plaintiff[s] in relevant aspects given the claims and defenses asserted; and (3) those individuals want to opt in to the lawsuit.[85]

But a court will not certify a class if the claim arises from "purely personal" circumstances.[86]

First, the district court found that plaintiffs had stated a claim for the

78. *Id.* at 24.
79. *Id.* at 26.
80. *Id.*
81. Aguayo v. Bassam Odeh, Inc., No. 3:13-CV-2951-B, 2014 WL 737314, at *1 (N.D. Tex. Feb. 26, 2014).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at *2–3 (quoting Morales v. Thang Hung Corp., No. 4:08-2795, 2009 WL 2524601, at *2 (S.D. Tex. Aug. 14, 2009)).
86. *Id.* at *3 (quoting Tolentino v. C & J Spec-Rent Servs. Inc., 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010)).

aggrieved individuals by alleging that they were denied overtime pay.[87] The plaintiffs provided declarations identifying the fictitious employees used and alleging that the defendants applied this policy to all Hispanic employees.[88] Additionally, the defendants acknowledged that the same manager—accused of making threats—also worked at other franchise locations; accordingly, the court found that there was a reasonable basis for concluding that other aggrieved individuals existed.[89]

Second, plaintiffs detailed their duties as fast food employees and claimed to have worked at several other franchise locations.[90] Coupled with the fraudulent pay scheme using fictitious employees, the district court found that there was sufficient evidence to indicate that similarly situated individuals existed in this case.[91]

Third, based on the prior reasons, the district court found that similarly situated individuals would want to opt into the lawsuit.[92] Plaintiffs' declarations stated that they knew of other individuals who had also been denied overtime pay and argued that "courts have allowed for class certification without either the submission of statements from similarly situated employees or affidavits from named plaintiffs that provide specific information about other employees."[93]

Despite the above reasons, the district court found that the plaintiffs' proposed class was too broad without evidence indicating that the fraudulent pay scheme existed in restaurants in Louisiana or throughout Texas.[94] Instead, the evidence only showed that the plaintiffs and the manager who had threatened the plaintiffs had all worked in various franchise locations owned and operated by the defendants or by companies in which the defendants had an interest.[95] The district court limited the prospective class to current and former employees who had been denied overtime pay and had worked at specific franchise locations identified by the plaintiffs.[96]

Similarly, the U.S. District Court for the Western District of Texas in *Pacheco v. Aldeeb* conditionally certified a class based on minimal evidence of similarly situated aggrieved individuals who might want to join the lawsuit.[97] The plaintiffs were food service workers at fast food franchise restaurants. Two of the plaintiffs worked as managers in different locations.[98] The plaintiffs alleged that the defendants did not properly

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at *4.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at *5.
95. *Id.*
96. *Id.*
97. Pacheco v. Aldeeb, No. 5:14-CV-121-DAE, 2015 WL 1509570, at *8 (W.D. Tex. Mar. 31, 2015).
98. *Id.* at *1.

compensate them for overtime, required unpaid work outside of their shifts, and made unlawful deductions from their paychecks in violation of the FLSA.[99] The plaintiffs sought conditional class certification of current and former employees who had worked in the defendants' franchise stores in Bexar and Kendall Counties within the three years preceding the suit.[100]

As in *Aguayo*, the district court used a three-step analysis to determine whether to certify the proposed class.[101] The district court, however, noted that its determination at that stage was made "using a fairly lenient standard because the court generally has minimal evidence and because [t]he remedial nature of the FLSA . . . militate[s] strongly in favor of allowing cases to proceed collectively."[102] And, affidavits and declarations based on personal knowledge are acceptable forms of evidence, regardless of whether such evidence would be admissible at trial.[103] The plaintiffs offered three declarations of employees who worked at some of the franchise locations, were not paid for their overtime work, and had spoken with other similarly situated employees.[104] The plaintiffs also alleged that the defendants' policies of denying overtime pay applied to many (if not all) employees. The plaintiffs presented paystubs indicating that they had not received overtime pay.[105] Based on this evidence, the district court found that the plaintiffs had offered sufficient evidence to support their allegations and to establish that aggrieved individuals existed.[106]

The district court ultimately found that only two of the plaintiffs were similarly situated to the proposed class, while the third plaintiff was not.[107] In its analysis, the district court determined whether the individuals executed the same basic tasks and experienced the same pay practices.[108] The district court held that two of the plaintiffs were similarly situated because they received the same hourly compensation, performed duties similar to those performed by non-supervisory employees, and faced the same policies of non-payment for overtime work.[109] On the other hand, the district court found that plaintiff Pacheco was not similarly situated because he had worked as an area manager, supervised operations for several locations, and was authorized to make personnel

99. *Id.* at *1–2.
100. *Id.* at *2–3.
101. *Id.* at *3–8.
102. *Id.* at *2 (quoting Lee v. Metrocare Servs., 980 F. Supp. 2d 754, 759 (N.D. Tex. 2013); Tolentino v. C & J Servs. Inc., 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010) (internal quotation marks omitted).
103. *Pacheco*, 2015 WL 1509570, at *3–4.
104. *Id.* at *4.
105. *Id.*
106. *Id.* at *4–5.
107. *Id.* at *6.
108. *Id.* (quoting Tice v. AOC Senior Home Health Corp., 826 F. Supp. 2d 990, 996 (E.D. Tex. 2011)).
109. *Id.*

decisions.[110] Although serving in a managerial role does not, standing alone, preclude one from representing non-managerial employees, Pacheco had markedly different responsibilities, was paid on a unique bonus compensation plan, and was initially hired by the defendants as an independent contractor.[111] Accordingly, the district court found that Pacheco could proceed as an individual plaintiff but could not join the class.[112]

Finally, the district court found that the plaintiffs established that other aggrieved individuals would join the suit by presenting minimal evidence—plaintiffs' declarations referring to over 100 employees that had worked at some of the locations.[113] In fact, two opt-in plaintiffs had already filed notices to join the suit.[114] The district court also allowed the plaintiffs to send notice of the class action by posting notices in the defendants' franchise locations.[115] While the defendants objected that such postings would damage their reputation, the district court noted that the notice should be placed at a location readily accessible only to the defendants' employees, not its customers.[116]

Aguayo and *Pacheco* are similar cases but with one key difference: the district court excluded plaintiff Pacheco because his duties and pay were not sufficiently similar to the other plaintiffs in the suit and to the members of the proposed class.[117] *Pacheco* indicates that although some managerial employees may remain in a class with non-managerial employees, the line drawn depends upon the specific duties and pay scheme of each individual plaintiff. While the evidentiary standard is low, a court may still exclude an individual plaintiff from a class action if that plaintiff's circumstances are not sufficiently similar to the proposed class members.

E. Arbitration

As arbitration provisions are common in franchise agreements, courts continue to explore the scope of those provisions to determine which claims may be litigated. In *DXP Enterprises v. Goulds Pumps, Inc.*, the U.S. District Court for the Southern District of Texas traversed the issue

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110. *Id.*

111. *Id.* at *6–7 (citing Aguilar v. Complete Landsculpture, Inc., No. 3:04 CV 0776 D, 2004 WL 2293842, at *4 (N.D. Tex. Oct. 7, 2004)).

112. *Id.* at *7 (citing Tolentino v. C & J Spec-Rent Servs. Inc., 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010) ("Requiring a prospective class to share similar job requirements and pay provisions ensures the economy of scale and judicial efficiency envisioned by the FLSA by avoiding the need for individualized inquiries into whether a defendant's policy violates the FLSA as to some employees but not others.")).

113. *Id.* at *8.

114. *Id.*

115. *Id.* at *9.

116. *Id.* Previous courts have even approved posting notice in newspapers and radio advertisements over objections of reputational damage. *Id.* (citing Rodriguez v. Mech. Tech. Servs., Inc., 299 F.R.D. 154, 156–57 (W.D. Tex. 2014); Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 493 (E.D. Cal. 2005); Johnson v. Am. Airlines, Inc., 531 F. Supp. 957, 961 (N.D. Tex. 1982)).

117. *Id.* at *6.

of whether an arbitration provision containing an exception for equitable remedies allowed a party to seek a permanent injunction in court.[118] DXP, an industrial equipment dealer, signed a distributor agreement with Goulds, a manufacturer of pumps, parts, and accessories.[119] The distributor agreement contained an arbitration clause that covered any controversy or claims "arising out of or related to" the agreement.[120] When the relationship between the parties soured, Goulds sought to terminate the agreement and demanded arbitration.[121] DXP responded with a lawsuit and sought preliminary and permanent injunctions to prevent termination without statutory notice or good cause.[122] The parties agreed to stay termination pending arbitration, and the district court denied the preliminary injunction.[123]

The district court then considered DXP's motion for a permanent injunction under federal policy and statutes favoring arbitration.[124] DXP's ability to seek a permanent injunction through litigation depended upon whether its claim fell under any exception within the arbitration clause.[125] While broadly covering claims arising out of or related to the agreement, the arbitration provision also allowed either party to seek "an equitable remedy (such as a Restraining Order or Injunction)" in court.[126] In cases involving similar contractual language, courts have held that under this exemption a party may seek a "temporary injunctive relief to maintain the status quo" but cannot do so if it "would require the court to consider and decide the merits of a[ ] . . . claim" that could otherwise be arbitrated.[127] Instead, courts have required "the most forceful evidence" to allow parties to litigate all claims for injunctive relief that would otherwise appear before the arbitrator.[128] Thus, "[a]ribtration agreements that lack such unambiguous language and simply state that parties can ask courts for injunctive relief 'notwithstanding' an agreement to arbitrate do not sufficiently show that claims for permanent injunctive relief are nonarbitrable."[129] Because the distributor agreement did not contain clear

118. DXP Enters. v. Goulds Pumps, Inc, No. H-14-1112, 2014 U.S. Dist. LEXIS 156158, at *1–2 (S.D. Tex. Nov. 4, 2014).

119. *Id.* at *2.

120. *Id.*

121. *Id.* at *4–5.

122. *Id.* at *5.

123. *Id.* at *5–6.

124. *Id.* at *7–8.

125. *See id.* at *9–11.

126. *Id.* at *3, *9.

127. *Id.* at *11–12 (citing Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1281–82, 1285 (9th Cir. 2009); WMT Inv'rs, LLC v. Visionwall Corp, No. 09-CIV-10509-RMB, 2010 U.S. Dist. LEXIS 65869, at *2–4 (S.D.N.Y. June 28, 2010); Clarus Med., LLC v. Myelotec, Inc., No. 05-934, 2005 U.S. Dist. LEXIS 30540, at *3–4 (D. Minn. Nov. 30, 2005)).

128. *Id.* at *15–16 (quoting AT&T Tech., Inc. v. Comms. Workers of Am., 475 U.S. 643, 650 (1986)). The district court cited several examples of such strong evidence, including *Dickeys Barbecue Restraunts v. Mathieus*. *Id.* (citing Dickeys Barbecue Rests. v. Mathieu, No. 3:12-cv-5119-G, 2013 U.S. Dist. LEXIS 133204, at *5 (N.D. Tex. Sept. 18, 2013)).

129. *Id.* at *16–17 (citing Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1164 (5th Cir. 1987); *Clarus Med.*, 2005 U.S. Dist. LEXIS 30540, at *3–4; ESecuritel Hold-

evidence of the parties' intent to allow claims for permanent injunctive relief to be litigated, the district court found that DXP's claim should be submitted to arbitration.[130]

The district court also made much of the fact that the issue that DXP sought to litigate was the very same issue that Goulds had already brought before arbitration—that is, whether Goulds could terminate the agreement based on DXP's prior alleged breach.[131] A finding that DXP had not breached the agreement and preventing Goulds from terminating the agreement would effectively deny Goulds the opportunity to have an arbitrator decide the issues, which would defeat the purpose of a valid arbitration clause.[132]

DXP serves as a cautionary case for parties including an arbitration clause in their franchise agreement: "notwithstanding" language conflicts with the arbitration provision and does not provide sufficiently clear or explicit exemptions for permanent injunction claims.[133] Although the line is not so easily drawn, the *DXP* ruling indicates a preference that exemptions from arbitration be identified and stated using explicit language.

Allee Corp. v. Reynolds & Reynolds Co. also reflects an inclination to broadly interpret an arbitration clause to include all possible claims.[134] Two car dealerships sued a professional services company for wrongfully deleting its electronic business records, alleging causes of action for declaratory judgment, negligence, and breach of contract.[135] The defendant moved to compel arbitration based on the arbitration clause in the contract.[136]

Once again, the U.S. District Court for the Northern District of Texas considered whether a plaintiff's claims could be litigated under a strong presumption that favors arbitration.[137] The arbitration clause covered "[a]ny disputes . . . related directly or indirectly" to the agreement or an exhibit specifying items or services—language that indicated a broad ar-

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ings v. Youghiogheny, No. 4-12-0302-cv, 2012 Tex. App. LEXIS 10017, at *3–4 (Tex. App.—San Antonio Dec. 5, 2012, pet. denied)).

130. *DXP Enters.*, 2014 U.S. Dist. LEXIS 156158, at *18, *20.

131. *Id.* at *8–9.

132. *Id.* at *19–20 (citing Halide Grp Inc. v. Hyo-sung Corp., No. 10-02392, 2010 U.S. Dist. LEXIS 118739, at *3–4 (E.D. Pa. Nov. 8, 2010); H2O to Go, LLC v. Martinez, No. 05-21353, 2005 U.S. Dist. LEXIS 49317, at *4–5 (S.D. Fla. Aug. 22, 2005); Baychar v. Frisby Techs., No. 01-cv-28-B-S, 2001 U.S. Dist. LEXIS 11037, at *9 (D. Me. July 26, 2001)).

133. *See id.* at *12–13, *16–18; *cf. Dickeys*, 2013 U.S. Dist. LEXIS 133204, at *6–9 (finding that all claims for injunctive relief were excluded from arbitration where the provision contained the word "notwithstanding" while exempting claims for injunctive relief in court and without having first been brought to arbitration).

134. *See generally* Allee Corp. v. Reynolds & Reynolds Co., No. 3:15-CV-0744-D, 2015 U.S. Dist. LEXIS 55548 (N.D. Tex. Apr. 28, 2015).

135. *Id.* at *1–2.

136. *Id.* at *3.

137. *Id.* at *13–14 ("Thus the party seeking to compel arbitration need only show that the arbitration clause can plausibly be read to cover the dispute in issue.") (citing Neal v. Hardee's Food Sys., Inc., 918 F.2d 34, 37 (5th Cir. 1990)).

bitration clause.[138] Given this low bar, the district court found that the defendant established that the plaintiffs' claims related at least indirectly to the agreement.[139] The plaintiffs alleged that the defendant breached the agreement and complained about the defendant's services performed under the agreement.[140] The plaintiffs also argued that the defendant's assertion that the amount in controversy for the case was $1.7 million indicated that the parties' dispute related to failures to pay amounts due under the agreement—an explicit exception to the arbitration clause.[141] The district court rejected the plaintiffs' attempts to use the amount in controversy assertion outside of its intended context.[142] However, even if the plaintiffs had presented sufficient evidence, "[w]hen the scope of an arbitration clause is reasonably in doubt, it should be construed in favor of arbitration. . . . This strong presumption in favor of arbitration applies with even greater force when the parties include a broad arbitration clause."[143]

The *DXP* and *Allee* holdings stand as prime examples of the continuing, strong inclination to give effect to an arbitration clause reasonably interpreted as broad in scope.

F. Jury Waiver Provisions

In *Yumilicious Franchise, L.L.C. v. Barrie* (*Yumilicious I*), franchisor Yumilicious sued the franchisee and its individual guarantors for breach of two franchise agreements after the franchisee failed to make payments and closed a store without Yumilicious's prior consent.[144] After the defendants counterclaimed that Yumilicious had fraudulently induced them into entering the franchise agreements, Yumilicious moved to dismiss the counterclaims and to strike defendants' jury demand based on a jury waiver provision in one of the franchise agreements.[145] The defendants argued that the individual defendants were not bound by the waiver because they were not parties to the franchise agreement, while Yumilicious responded that language in the guaranty agreement bound the individual defendants to the waiver provision.[146]

The U.S. District Court for the Northern District of Texas determined that Yumilicious did not prove that the defendants had "waived their right to a jury trial."[147] As a protected constitutional right, the right to a

138. *Id.* at *14–16 (citing *In re* Complaint of Hornbeck Offshore (1984) Corp., 981 F.2d 752, 755 (5th Cir. 1993)).
139. *Id.* at *16–17.
140. *Id.* at *17.
141. *Id.* at *18.
142. *Id.* at *18–19.
143. *Id.* at *19–20 (quoting Sharifi v. AAMCO Transmission Repair Ctrs., 2007 U.S. Dist. LEXIS 47311, at *2 (N.D. Tex. June 28, 2007)).
144. Yumilicious Franchise, L.L.C. v. Barrie, No. 3:13-CV-4841-L, 2014 WL 4055475, at *1 (N.D. Tex. Aug. 14, 2014) [hereinafter *Yumilicious I*].
145. *Id.* at *1, *10–11.
146. *Id.* at *10.
147. *Id.* at *12.

jury trial carries a presumption against its waiver.[148] A party may overcome this presumption by presenting sufficient evidence of a contractual waiver that "was made knowingly, voluntarily, and intelligently."[149] The district court then followed the majority of federal courts in concluding "that the party seeking to enforce the waiver has the burden of establishing it."[150]

The district court considered whether the waiver "was made knowingly, voluntarily, and intelligently" according to the following factors:

> (1) whether there was gross disparity in bargaining power between the parties; (2) the business or professional experience of the party opposing the waiver; (3) whether the opposing party had an opportunity to negotiate contract terms; and (4) whether the clause containing the waiver was inconspicuous.[151]

The district court found that the waiver provision was conspicuous because the words were bolded and the letters were capitalized.[152] However, the contractual language that bound the franchisee's beneficiaries to the franchise agreement was not bolded or capitalized and, thus, not conspicuous.[153] Further, the guaranty agreement did not specifically refer to the jury waiver provision as it did other franchise agreement provisions.[154] Because Yumilicious failed to establish the other factors, the district court denied the motion to strike the defendants' jury demand.[155]

The holding in *Yumilicious I* indicates that a party seeking to enforce a contractual waiver of the right to a jury trial against individual guarantors must submit evidence that specifically ties the individuals to the general franchise agreement.[156] Where a guaranty agreement references some sections of the franchise agreement but not others, a court may find that the individual guarantors did not intend to bind themselves to all provisions of the franchise agreement.[157] *Yumilicious I* also signals an inclination to place the burden on the party seeking to enforce a jury trial waiver, although the U.S. Court of Appeals for the Fifth Circuit has not yet determined that issue.[158]

G. Statute of Limitations

The *Yumilicious* court also considered the statute of limitations for counterclaims based on violations of the Texas Deceptive Trade Prac-

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148. *Id.* at *11.
149. *Id.*
150. *Id.*
151. *Id.* (quoting RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813–14 (N.D. Tex. 2002)).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at *12.
156. *See id.* at *11–12.
157. *See id.* at *11.
158. *See id.*

tices-Consumer Protection Act (DTPA) (*Yumilicious II*).[159] When Yumilicious sued the franchisees for failing to make payments and prematually closing a yogurt shop, defendants counterclaimed that Yumilicious violated the DTPA by providing a materially deficient franchise disclosure document (FDD).[160]

In *Yumilicious I*, Yumilicious moved to dismiss the DTPA counterclaim, asserting that the claim was barred by the DTPA's two-year statute of limitations.[161] The district court agreed, finding that the statute of limitations had expired before the defendants had asserted their counterclaims.[162] According to the defendants, Yumilicious had provided an FDD that was dated two years earlier than the franchise agreement and incorrectly stated that Yumilicious had provided earnings financial performance representations six weeks before the defendants signed the franchise agreements.[163] The district court dismissed these arguments, noting that the defendants acknowledged having received the document in the same month they signed the franchise agreement.[164] Because that event triggered the statute of limitations, which expired by the time the defendants asserted their counterclaim, the district court held that the DTPA claim was barred.[165]

But when the defendants subsequently moved for reconsideration in *Yumilicious II*, the district court found that the DTPA claim was not barred by the statute of limitations for DTPA claims.[166] Instead, the statute of limitations for counterclaims permitted the DTPA claim.[167] First, the district court considered the defendants' argument that the discovery rule saved their DTPA claim, because "[t]he discovery rule tolls a statute of limitations 'until the plaintiff knew or . . . should have known of the facts giving rise to [the claim].'"[168] The defendants claimed they did not discover the ongoing fraudulent misrepresentations until shortly before the stores failed and the suit commenced.[169] The district court found that the defendants did not meet their burden of affirmatively pleading the discovery rule and, thus, had waived the matter.[170] Even if the defendants had met this requirement, the district court determined that their pleadings did not establish that Yumilicious's alleged misrepresentations continued for two years until the stores failed because all the alleged

159. *See generally id.*; Yumilicious Franchise, L.L.C. v. Barrie, No. 3:13-CV-4841-L, 2015 WL 1822877 (N.D. Tex. Apr. 22, 2015) [hereinafter *Yumilicious II*].
160. *Yumilicious I*, 2014 WL 4055475, at *1, *4.
161. *Id.* at *3.
162. *Id.* at *4.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Yumilicious II*, No. 3:13-CV-4841-L, 2015 WL 1822877, at *1–3 (N.D. Tex. Apr. 22, 2015).
167. *Id.*
168. *See id.* at *1–2 (citing Barker v. Eckman, 213 S.W.3d 306, 311–12 (Tex. 2006)).
169. *See id.*
170. *Id.* at *2 (citing Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 (Tex. 1988)).

misrepresentations occurred before the franchise agreements were signed.[171] The defendants also claimed that they were not aware that Yumilicious's requirement that the franchisee purchase the products in bulk, pallet-sized quantities would lead to their franchise business being unable to compete with other yogurt shops.[172] The defendants, however, were aware of this requirement from the beginning. While Yumilicious stated that "it was in the process of negotiating a contract with a national distributor" to obtain fair market prices, Yumilicious did not assure the defendants that such negotiations would eliminate the bulk-size purchase requirement.[173] Because the defendants were aware of these circumstances before entering the franchise agreements, the district court found that the "[d]efendants knew or reasonably should have known the facts giving rise to their DTPA claim," such that the discovery rule did not toll the statute of limitations.[174]

On the other hand, the district court then accepted the defendants' argument that their DTPA claim was not barred under § 16.069 of the Texas Civil Practice and Remedies Act regarding the statute of limitations for counterclaims.[175] Although the two-year statute of limitations for DTPA claims had expired, the statute of limitations for counterclaims had not.[176]

Yumilicious II suggests that certain facts or events that occur before a franchisee enters a franchise agreement may not be sufficient to toll the statute of limitations under the discovery rule if the franchisee was aware of their existence before entering the franchise agreement. Further, while DTPA claims are typically subject to a two-year statute of limitations, counterclaims are subject to the general statute of limitations for counterclaims.

III. INTELLECTUAL PROPERTY—TRADEMARKS

In *New York Pizzeria, Inc. v. Syal*, the U.S. District Court for the Southern District of Texas considered whether a pizzeria franchisor could pursue claims against a former franchisee, and individual defendants, for infringement of a distinctive flavor mark and plating trade dress.[177]

New York Pizzeria, Inc. (NYPI), a franchisor of pizza restaurants, filed suit alleging that a former vice president of NYPI and owner of an NYPI-franchised restaurant conspired with others "to create a knockoff restaurant chain called Gina's Italian Kitchen using NYPI's [trade secrets and proprietary information, including] recipes, suppliers, and internal docu-

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at *3.
176. *Id.* The district court eventually dismissed the defendants' DTPA claims on other grounds. *See infra* Section V.A. Texas Deceptive Trade Practices—Consumer Protection Act.
177. N.Y.C. Pizzeria, Inc. v. Syal, 56 F. Supp. 3d 875, 877 (S.D. Tex. 2014).

ments and manuals."[178] NYPI argued that the defendants "infringed on its trademarks and trade dress," and brought "two distinct claims under the Lanham Act."[179] One claim related to the "'distinctive flavor' of NYPI's [food]"; the other related "to the distinctive presentation, or 'plating,' of [NYPI's] dishes."[180]

First, NYPI argued that its "specially sourced branded ingredients and innovative preparation and preservation techniques contribute[d] to the distinctive flavor" of its products.[181] And by using those ingredients and processes, defendants had "infringed and/or diluted NYPI's protected trademark interest in the distinctive trademark flavor of its products" and were therefore liable under the Lanham Act.[182]

The district court noted that while there was "no special legal rule" in the Lanham Act that prevented a flavor from serving as a trademark, "it is the source-distinguishing ability of a mark—not its ontological status as color, shape, fragrance, word, or sign—that permits it to serve [trademark] purposes."[183] The district court found that it is possible for flavor to "'carry meaning' . . . only if it distinguishes the source of a product"; however, it is only when a flavor has acquired distinctiveness, or "secondary meaning," that the flavor has any chance to serve as a valid trademark.[184]The district court also found that it was unlikely that flavors—like colors—could "ever be inherently distinctive because they do not automatically suggest a product's source."[185] Thus, the district court held that in order to be protectable as a trademark, a flavor must have acquired secondary meaning such that customers associate the flavor with its source.[186]

In addition, the district court addressed the functionality doctrine: "A product feature is functional if 'it is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-

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178. *Id.* at 877.

179. *Id.* at 880 (citing 15 U.S.C. § 1125(a)).

180. *Id.*

181. *Id.* (quoting First Amend. Compl. at ¶ 76, N.Y.C. Pizzeria, Inc. v. Sval, 56 F. Supp. 3d 875 (S.D. Tex. 2014) (No. 3:13-cv-00335), 2013 WL 11109493).

182. *Id.* (quoting First Amend. Compl. at ¶ 77, N.Y.C. Pizzeria, Inc. v. Sval, 56 F. Supp. 3d 875 (S.D. Tex. 2014) (No. 3:13-cv-00335), 2013 WL 11109493).

183. *Id.* at 880–81.

184. *Id.* at 881.

185. *Id.*

186. *Id.* (citing Sunbeam Prods., Inc. v. W. Bend Co., 123 F.3d 246, 252 (5th Cir. 1997) ("[T]he essence of a protected mark is its capacity to distinguish a product and identify its source."); Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 211 (2000) ("[A] mark has acquired distinctiveness, even if it is not inherently distinctive, if it has developed secondary meaning, which occurs when, 'in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.'"); *In re* N.V. Organon, 79 U.S.P.Q.2d 1639, at *15 (T.T.A.B. June 14, 2006) ("Because flavor is generally seen as a characteristic of the goods, rather than as a trademark, a flavor, just as in the cases of color and scent, can never be inherently distinctive.")).

related disadvantage.'"[187] In the case of food, the district court observed that the functionality hurdle may be insurmountable because the "flavor of food undoubtedly affects its quality, and is therefore . . . a functional element of the product."[188]

NYPI was "unable to cite any case recognizing a trademark in the flavor of food."[189] Indeed, NYPI did "not allege that its supposedly unique flavoring was merely an identifier, and any such allegation would be implausible given that the flavor of pasta and pizza has a functional purpose."[190] Therefore, the district court dismissed NYPI's trademark claim.[191]

Next, the district court considered NYPI's plating infringement claim and found that "[w]hile the flavor infringement claim [was] plainly half-baked, NYPI's plating infringement claim deserve[d] closer consideration" because, unlike the flavor infringement claim, plating does not always serve a functional purpose.[192] NYPI alleged a protected trade dress interest in "the distinctive visual presentation of the product to customers . . . [which] includes, but is not limited to, the presentation of baked ziti, eggplant parmesan, and chicken parmesan."[193]

The district court recognized that there might be some rare circumstances in which the plating of food could be given trade dress protection, for example, for a well-known "signature dish."[194] But, in the trade dress context, a plaintiff must articulate the elements that comprise its protected trade dress so that the district court can evaluate the plausibility of its claim and the defendant has fair notice of the grounds of the claim.[195] Here, the district court held that NYPI did not identify its trade dress with sufficient particularity because NYPI did not explain why its dishes' presentations were distinctive and nonfunctional, or how they were infringed.[196] Therefore, the district court dismissed NYPI's trade dress claim.[197]

Though this may seem like a tough ruling for franchisors of distinctive food flavors, it is an appropriate outcome. Otherwise, the first food distributor to trademark a flavor profile could prevent all others from replicating that flavor and could greatly restrict innovation in our food supply.

The ruling also makes sense because food vendors can still rely on

187. *Id.* (citing Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 165 (1995) (internal quotation marks omitted)).
188. *Id.* at 882 (citing *Qualitex*, 514 U.S. at 165).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 883 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Alpha Kappa Alpha Sorority, Inc. v. Converse Inc., 175 F. App'x 672, 677–81 (5th Cir. 2006)).
196. *Id.*
197. *Id.*

trade secret law to protect their recipes.[198] However, this case serves as a good reminder to those in the restaurant industry to protect their trade secrets. For example, franchisors should take precautions to guard their cooking secrets and to ensure that they are employing effective nondisclosures and confidentiality agreements with their franchisees.[199]

IV. COMMON LAW CLAIMS

A. Contract Issues—The Duty of Good Faith and Fair Dealing

Texas courts impose extra-contractual duties of "good faith and fair dealing" only when a special relationship between the parties exists.[200] These duties generally result from the unequal bargaining positions between parties to a contract.[201] Texas courts have found no special relationship between or among the parties to an extensive laundry list of contractually-based transactions.[202] In particular, Texas courts have found no special relationship exists between parties to a franchise agreement.[203] In *Williamson-Dickie Manufacturing Co. v. Apparel Ltd, Inc.*, the U.S. District Court for the Northern District of Texas considered whether Texas would recognize a special relationship between a licensor and licensee.[204] Not surprisingly, the district court determined that no special relationship existed.[205]

Williamson-Dickie Manufacturing Co. (Williamson-Dickie) and Apparel Ltd. (Apparel) entered into a licensing agreement granting Apparel the exclusive right to sell Williamson-Dickie branded products using Williamson-Dickie's trademarks through "authorized channels," including mass-merchandisers, in the United States.[206] After Williamson-Dickie sued Apparel, Apparel counterclaimed for breach of good faith and fair dealing based on the allegation that Williamson-Dickie had sold products directly to mass merchandisers.[207] Observing that no Texas court has addressed the issue of whether a licensor owes a licensee a duty of good faith and fair dealing, the court made an "Erie guess" as to how the Texas Supreme Court would rule.[208]

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198. Mark S. VanderBroek & Christian B. Turner, *Protecting and Enforcing Trade Secrets*, 25 Franchise L.J. 191, 192 (2006).
199. *Id.*
200. *See* Williamson-Dickie Mfg. Co. v. Apparel Ltd., No. 4:15-CV-164-A, 2015 U.S. Dist. LEXIS 75227, at *5 (N.D. Tex. June 10, 2015) (citing City of Maryland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000); Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225 (Tex. 2002)).
201. *See id.* at *6
202. *See id.*
203. *See id.* (citing Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225 (Tex. 2002)).
204. *Id.* at *5.
205. *Id.* at *7.
206. *Id.* at *2.
207. *Id.* at *3.
208. *Id.* at *6.

Applying Texas law, the district court recognized that Texas law does not recognize an implied covenant of good faith and fair duty in contracts, absent a special relationship, such as insurance contracts.[209] Comparing the licensor-licensee relationship to the franchisor-franchisee relationship, where Texas courts have already declined to find a special relationship, the court determined that the implied covenant did not exist in a trademark license agreement because the licensor-licensee relationship closely resembled the franchisor-franchisee relationship.[210] Thus, the court added the trademark license agreement to the list of contractually-based transactions in which no special relationship between the parties exists.[211]

B. Fraud and Misrepresentation

In a third *Yumilicious* decision (*Yumilicious III*)—a separate opinion from the other two *Yumilicious* cases mentioned above—the U.S. District Court for the Northern District of Texas considered Yumilicious's motion for partial dismissal of the defendant's counterclaims and motion for partial summary judgment.[212] After Yumilicious brought an action against franchisee defendants for breaches of the two franchise agreements, franchisees counterclaimed that Yumilicious fraudulently induced them into entering into the franchise agreements and asserted claims for fraud and negligent misrepresentation, among other claims.[213] The franchisee's claims were based on Yumilicious's alleged failure to perform on-site evaluations and inspections, operational advice, and product sourcing pursuant to the terms of the franchise agreements, as well as alleged misstatements made regarding product pricing.[214]

First, the district court dealt with the fraud claims. In granting Yumilicious's motion to dismiss the fraud and negligent misrepresentation claims, the district court determined that these claims were barred by the economic loss rule, which prevents recovery in tort for a party's failure to perform under a contract.[215] The district court determined that the economic loss rule applied because the fraud and negligent misrepresentation claims were tied directly to the franchise agreements and arose only from the contractual relationship between the parties.[216] Nor did the franchisee show "any loss independent of the franchise agreement."[217]

Next, the district court turned to the alleged misrepresentations regarding price allegedly made by the franchisor's sales representative.[218] The

209. *Id.* at *5–6.
210. *Id.*
211. *Id.*
212. Yumilicious Franchise, L.L.C. v. Barrie, No. 3:13-CV-4841-L, 2015 U.S. Dist. LEXIS 53144, at *10–14 (N.D. Tex. Apr. 23, 2015) [hereinafter *Yumilicious III*].
213. *Id.* at *2–3.
214. *Id.* at *15, *21–22.
215. *Id.* at *19–20.
216. *Id.* at *20.
217. *Id.*
218. *Id.* at *21–22.

district court dismissed these claims as well because the franchisee failed to provide any evidence that any representations were made, whether through depositions, testimony, or other evidence.[219]

C. Vicarious Liability

The issue of joint employment, which results essentially in imposing vicarious liability on the franchisor for labor law violations asserted by a franchisee's employees against the franchisee, has been front and center in franchising since the National Labor Relations Board (NLRB) issued complaints against McDonald's USA, LLC (McDonald's) and franchisees of McDonald's, as joint employers of the franchisee's employees.[220] The complaints are based upon the NLRB's new standard that by possessing the ability to exercise control over a franchisee's employment policies, the franchisor becomes a joint employer of the franchisee's employees even if the franchisor does not actually exercise any control.[221]

In response to the NLRB's wide-reaching determination that would classify franchisors as joint employers with its franchisees, the 84th Regular Legislative Session passed SB 652, which became effective on September 1, 2015.[222] SB 652 generally protects franchisors from blanket exposure to liability for employment claims asserted by franchisees and the employees of franchisees. The bill amends Texas Labor Law to establish that unless a franchisor exercises direct control over a franchisee or a franchisee's employees above and beyond what is necessary to protect the franchisor's trademarks brand, the franchisor will not be deemed an employer of a franchisee or a joint employer of the franchisee's employees.[223] SB 652 sets forth a joint employment standard previously utilized by the NLRB prior to the complaints issued against McDonald's.[224] The standard applies in the context of employment discrimination, wage and hour payment, minimum wage law, professional employer organization law, unemployment law, workers compensation law, and workplace safety law.[225] Future court decisions should clarify what conduct constitutes "necessary" control versus control that is "above and beyond."

Franchisors often face the issue of whether the franchisor is a proper party to an employment proceeding brought before an administrative

219. *Id.* at *22.
220. *See NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's USA, LLC as Joint Employers*, Nat'l Lab. Relations Bd. (Dec. 19, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against [https://perma.cc/A87X-NFS6].
221. *See Board Issues Decision in Browning-Ferris Industries*, Nat'l Lab. Relations Bd. (Aug. 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries [https://perma.cc/GY8S-NWQH].
222. Tex. S.B. 652, 84th Leg., R.S. (2015) (codified as Tex. Lab. Code Ann. § 91.0013 (West 2015)).
223. *Id.*
224. *Id.*
225. *Id.*

agency by a franchisee's employee. The U.S. Court of Appeals for the Fifth Circuit considered this issue in *EEOC v. Simbaki, Ltd.*,[226] which potentially expanded the number of discrimination and harassment suits franchisors may face for discrimination and harassment committed by franchisees.

Here, two female employees of a Berryhill Baja Grill & Cantina franchise filed separate charges of sexual harassment with the Equal Opportunity Commission (EEOC), naming "Berryhill Baja Grill" and listing the franchisee's address.[227] Even though the franchisor, Berryhill Hot Tamales Corporation, was not named as a party, the EEOC served notice on the franchisor that charges had been filed against "your organization."[228] The franchisor was not "invited to the fact-finding conference, and the majority of the notices relating to EEOC proceedings appear to have gone solely to" the franchisee.[229]

After investigating, the EEOC determined that the franchisee "had engaged in sexual harassment in violation of Title VII" and filed suit against the franchisee in the Southern District of Texas.[230] The employees then intervened and added the franchisor as a defendant, alleging that the franchisor was their single or joint employer under Title VII.[231] The franchisor moved for summary judgment on two grounds: (1) the employees "failed to exhaust their administrative remedies" because the franchisor was not named as a party in their EEOC charges; and (2) the employees could not show that the franchisor was either a single or joint employer under Title VII.[232] The district court granted summary judgment on the first ground, determining that the employees "could not invoke the judicially-recognized exceptions to Title VII's named-party requirement because they were represented by counsel when they filed their charges" with the EEOC.[233]

On appeal, the employees argued: (1) by identifying "Berryhill Baja Grill," the trade name of the franchisor in their EEOC complaint, they had, in fact, named the franchisor; and (2) even if the franchisor had not been named in the EEOC charges, represented parties are entitled to invoke the judicially-recognized exceptions to Title VII's named-party requirement.[234] The Fifth Circuit rejected the first argument but agreed with the second—represented parties, and not just pro se litigants, can invoke the exception to the rule that only named parties can be subsequently sued in federal court.[235] The Fifth Circuit found no justification

226. 767 F.3d 475 (5th Cir. 2014). Haynes and Boone represented the franchisor Berryhill in this matter.
227. *Id.* at 479.
228. *Id.*
229. *Id.* at 480.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 481–85.

for limiting the exceptions to pro se litigants.[236] First, the Fifth Circuit determined that allowing represented parties to invoke the exceptions is more consistent with the principle that pro se litigants are required to follow the federal rules of procedure and are held to the same pleading requirements as represented parties.[237] Second, the holding, which allows all litigants to invoke the exceptions, is more consistent with the liberal construction of Title VII's requirements.[238] Accordingly, the Fifth Circuit remanded the case back to the district court for a determination as to whether franchisor was a proper defendant.[239]

For franchisors, the named-party issue arises at the EEOC level with some frequency. *Simbaki* may therefore increase the legal risks faced by corporate parents. Thus, franchisors should pay close attention to Title VII allegations even if they are not directly identified in the EEOC charge. If the franchisor receives sufficient notice of the allegations, the named-party requirement may not be a defense to liability.

In *Domino's Pizza, L.L.C. v. Reddy*, the Beaumont Court of Appeals overturned a jury verdict that found Domino's franchisor vicariously liable for a death and serious injuries resulting from an accident caused by the defective vehicle of a delivery driver.[240] The court of appeals declared that whether a franchisor may be held vicariously liable for the acts of its franchisees depends on whether the franchisor had the right to the control the injury-causing conduct.[241] The court of appeals held that the "evidence was legally insufficient to support the jury's finding that Domino's controlled or had the right to control the details of the [franchisees and its employees'] injury-producing acts or omissions."[242] And because of the legally insufficient evidence, the court of appeals determined that it could not hold franchisor Domino's vicariously liable.[243] Accordingly, the court of appeals reversed the trial court's judgment and dismissed the negligence claims against Domino's.[244]

A vehicle driven by the franchisee's employee hydroplaned due to a bald tire and wet pavement, and struck a vehicle, killing one of the plaintiffs and injuring another.[245] The guardian of the estate and persons of plaintiffs sued Domino's and the franchisee for negligence.[246] After the franchisee settled, the case proceeded to trial against Domino's.[247] The jury apportioned liability and determined that the employee was 10%

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236. *Id.* at 484–85.
237. *Id.*
238. *Id.* at 485.
239. *Id.*
240. Domino's Pizza, L.L.C. v. Reddy, No. 09-14-00058-CV, 2015 Tex. App. LEXIS 2578, at *1 (Tex. App.—Beaumont Mar. 19, 2015, pet. filed) (mem. op.).
241. *Id.* at *3.
242. *Id.* at *18.
243. *Id.*
244. *Id.*
245. *Id.* at *1.
246. *Id.*
247. *Id.*

negligent, the franchisee was 30% negligent, and Domino's was 60% negligent.[248] After apportioning negligence, the jury then found that Domino's was vicariously liable because of four reasons: (1) Domino's "controlled or had the right to control . . . the injury-producing acts or omissions" of the franchisee and the franchisee's employees; (2) "Domino's failed to exercise ordinary care in the control or right to control those details"; (3) Domino's failure to use this "ordinary care was the proximate cause of the occurrence in question"; and (4) the franchisee's employee was "operating his vehicle in furtherance of a mission for the benefit of Domino's and subject to Domino's control."[249] Domino's appealed, contending that "the evidence [was] legally insufficient to establish that [Domino's] owed a duty to the [plaintiffs] because . . . it had no right to control the [franchisee's] day-to-day operations, did not exercise control over the injury-producing acts," and that, therefore, a court could not hold Domino's vicariously liable for the acts of the franchisee or the franchisee's employees.[250]

To determine whether a franchisor is vicariously liable for a franchisee's conduct, the court of appeals considered "whether the franchisor has the right to control the franchisee with respect to the details" of the specific injury-causing conduct at issue.[251] Right to control can be established by evidence of either a contractual agreement that explicitly assigns the franchisor a right to control or the franchisor's actual control.[252] Pointing to the following evidence as support, Plaintiffs contended that Domino's had both a contractual right of control and actual control:

> (1) [the franchisee] must comply with Domino's specifications, standards, and operating procedures, including the "methods and procedures relating to receiving, preparing, and delivering customer orders[;]" (2) Domino's can unilaterally modify its standards and procedures and can conduct inspections; (3) Domino's [could] terminate the franchise agreement if [the franchisee] fails to comply with corporate standards and procedures; (4) Domino's standards regulate driver age and history, safety, vehicle inspections, and driver conduct during deliveries; (5) [Domino's standards] promote speeding among delivery drivers by use of the thirty-minute rule, . . . time tracking, evaluations that factored delivery times into their scores and affected bonuses, and encouragement of incentives to improve job performance; and (6) Domino's decided the store's delivery area and provided directions and maps though [software that its franchisees were required to use].[253]

The court of appeals first considered whether Domino's had actual control over the franchisee and determined that no "right to control" ex-

248. *Id.*
249. *Id.* at *1–2.
250. *Id.* at *2.
251. *Id.* at *3.
252. *Id.*
253. *Id.* at *12–13.

isted.[254] In making this determination, the court of appeals looked to the franchise agreement, which expressly provided that:

> (1) [the franchisee] is an independent contractor; (2) the store's staff are employed by [the franchisee, not Domino's]; (3) Domino's has no legal right to direct [the franchisee's] employees; (4) [the franchisee] is solely responsible for recruiting, hiring, training, scheduling, supervising, and paying its employees; (5) [the franchisee] is solely responsible for operating the store; and (6) Domino's does not assume [the franchisee's] responsibilities by providing "reasonable operating assistance."[255]

That Domino's could terminate the franchise agreement, had a right to receive evaluations and other reports, could conduct inspections, or required franchisee to comply with Domino's procedures and rules was "not evidence that Domino's had the right to control."[256]

The court of appeals next rejected plaintiff's argument that Domino's had a contractual right to control.[257] Under the franchise agreement, the relationship between franchisee and franchisor was that of independent contractor.[258] The express provisions of a contract indicating that the parties' relationship is an independent contractor may be determinative absent the following evidence: (1) "the contract is a mere sham"; (2) the contract is a "subterfuge designed to conceal the true legal status of the parties"; or (3) "the contract has been modified by a subsequent agreement between the parties."[259] Here, the court of appeals found no evidence to negate the franchise agreement's express provision that sets an independent contractor relationship between the parties.[260] The court of appeals characterized the franchise agreement as "merely set[ting] forth the standards related to work," while leaving the "responsibility of implementing the details of those standards" to the franchisee's discretion.[261] An "occasional assertion of control or sporadic action directing the details of work" would not be enough to negate the express provision in the franchise agreement that sets the parties' independent contractor relationship.[262]

Finally, the court of appeals rejected franchisee's argument that "Domino's may be liable for unreasonably increasing the risk of harm."[263] The court of appeals worked with the premise that a contract, such as the franchise agreement, which "requir[es] independent contractors to comply with general safety practices and train their employees to do so can-

254. *Id.* at *14–15.
255. *Id.* at *13–14.
256. *Id.* at *14.
257. *Id.* at *15–16.
258. *Id.* at *4.
259. *Id.*
260. *Id.* at *15–16.
261. *Id.* at *15.
262. *Id.* at *15–16.
263. *Id.* at *16.

not constitute a right to control."[264] Nor could the franchisee's allegations that Domino's failed to implement or enforce a safety rule amount to actual control.[265] Here, the "means, methods, and details of implementing Domino's standards" were left to the franchisee's discretions, and the franchisee was responsible for training its employees, including drivers.[266] Therefore, Domino's imposition of contractual safety requirements, alone, did not subject Domino's to a duty of care to prevent its independent-contractor franchisee's negligent conduct or to vicarious liability for its independent contractor's negligence.[267]

Therefore, the court of appeals concluded that "the evidence [was] legally insufficient to support the jury's findings that Domino's controlled or had the right to control the details of the injury-producing acts or omissions of [the franchisee] and [the franchisee's] employees."[268]

Domino's is an example of how most courts are recognizing that the franchising model presents a unique situation for vicarious liability analysis. Although the Plaintiffs brought direct negligence claims against Domino's, the court's analysis focused on whether the franchisor owed a duty to Plaintiffs by following traditional vicarious liability analysis in the franchise context.[269] The court focused on which party actually had control over the instrumentality that caused the accident—in this case, driver training and means, method, and details of delivery safety.[270] The court also emphasized that the franchise agreement designated that the franchisee was an independent contractor.[271]

D. Tortious Interference

BP Automotive, L.P. v. RML Waxahachie Dodge, LLC[272] involved a failed asset purchase agreement for the sale of assets of a car dealership located in Waxahachie, Texas. In 2008, the car dealership, BP Automotive, L.P. (Bossier Dodge), "experienced financial difficulties and began looking for a potential buyer for its assets."[273] In 2009, a group of RML entities (RML) executed an asset purchase agreement, under which Bossier Dodge would sell its dealership assets.[274] As a condition of the deal, RML needed to seek the approval of Chrysler Motor, L.L.C. (Chrysler).[275] Thereafter, Chrysler filed for bankruptcy and rejected Bossier Dodge's franchise agreement as part of the bankruptcy proceed-

264. *Id.*
265. *Id.* at *16–17.
266. *Id.* at *17.
267. *Id.* at *17–18.
268. *Id.* at *18.
269. *See id.* at *12–18.
270. *See id.* at *13–17.
271. *See id.* at *15–18.
272. 448 S.W.3d 562 (Tex, App.—Houston [1st Dist.] 2014, pet. denied).
273. *Id.* at 566.
274. *Id.*
275. *Id.*

ings.[276] Subsequently, "the reorganized Chrysler awarded RML [a franchise agreement] in Waxahachie."[277]

Bossier Dodge then sued the potential buyer, RML, for breach of contract, tortious interference with an existing contract, tortious interference with a prospective business relationship, and several other causes of action.[278] RML moved for a no-evidence summary judgment on the tortious interference claims, which the trial court granted.[279] The First Houston Court of Appeals determined that the lower court properly granted the no-evidence motion as to the tortious interference with an existing contract claim, but erred in granting RML's motion as to the tortious interference with prospective business relationship claim.[280]

In Texas, there are four the elements to a cause of action for tortious interference with an existing contract: "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damage or loss."[281] "Bossier Dodge argue[d] that '[RML] [had] induced Chrysler to breach its franchise agreement with Bossier Dodge after Chrysler's bankruptcy so that RML would be awarded'" the Waxahachie franchise.[282] As to this claim, the court of appeals determined that "Bossier Dodge presented no evidence that Chrysler was bound to continue the franchise agreements that existed prior to its bankruptcy."[283] Indeed, the record showed that acceptance or rejection of the previously existing franchises was a requirement of the bankruptcy proceeding.[284] Thus, the court of appeals found that there was "no evidence of an existing contract that was subject to interference."[285] In addition, there was also no evidence of any willful or intentional act since the act complained of was "RML's filing of an application for the Chrysler franchise, presumably in competition with Bossier Dodge's own application."[286] Such competition was not a prohibited act.[287] Because there was no evidence of an existing contract subject to interference or of a willful and intentional act of interference by RML, "the trial court properly granted the no-evidence motion for summary judgment" on Bossier Dodge's tortious interference with an existing contract claim.[288]

By contrast, the court of appeals determined that the trial court erred in granting summary judgment on Bossier Dodge's claim for tortious in-

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276. *Id.*
277. *Id.*
278. *Id.* at 567.
279. *Id.* at 567–68.
280. *Id.* at 570–71.
281. *Id.* at 570.
282. *Id.*
283. *Id.* at 571.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*

terference with prospective business relations.[289] In Texas, there are four elements to a tortious interference with prospective business relationship claim:

> (1) a reasonable probability that the plaintiff would have entered into a business relationship; (2) an independently tortious or unlawful act by the defendant that prevented the relationship from occurring; (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or the defendant knew the interference was certain or substantially certain to occur as a result of the conduct; and (4) the plaintiff suffered actual harm or damages as a result of the defendant's interference.[290]

RML asserted that Bossier Dodge failed to establish any of these four elements.[291] The court of appeals found that the affidavit testimony presented by Bossier Dodge contained more than a scintilla of evidence in support of its claim for tortious interference with prospective business relations.[292] In this affidavit, one of Bossier Dodge's limited partners testified that a potential buyer of Bossier Dodge's assets approached the limited partner about buying Bossier Dodge's assets. The limited partner testified that when the potential buyer attempted to view the assets, RML incorrectly told the potential buyer that the assets had already been sold to RML.[293] Because Bossier Dodge had presented more than a scintilla of evidence in support of its claim for tortious interference with prospective business relationship, the court of appeals concluded that the trial court erred in granting RML's no-evidence motion for summary judgment on this claim.[294]

In *Williamson-Dickie Manufacturing Co. v. Apparel Ltd.*, previously discussed, the U.S. District Court for the Northern District of Texas determined that a duty of good faith and fair dealing did not exist in a licensor-licensee relationship.[295] The district court also dismissed the licensee's claims that a licensor tortiously interfered with its prospective business relationships but upheld the licensee's claims that the licensor tortiously interfered with the licensee's existing business relationships.[296] As discussed above, the license agreement at issue gave Apparel the exclusive right to sell Williamson-Dickie branded products using Williamson-Dickie's trademarks through "authorized channels," including mass merchandisers such as Wal-Mart, in the United States.[297] Apparel asserted tortious interference counterclaims based on the theory that Williamson-Dickie sold products directly to mass merchandisers, and those

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. Williamson-Dickie Mfg. Co. v. Apparel Ltd., No. 4:15-CV-164-A, 2015 U.S. Dist. LEXIS 75227, at *5–7 (N.D. Tex. June 10, 2015).
296. *Id.* at *7–8.
297. *Id.* at *2.

sales tortiously interfered with its existing business relationships with its buyer as well as with its prospective customers.[298]

First, the district court determined that Apparel had adequately pled a cause of action for tortious interference with its existing business relationships.[299] Williamson-Dickie challenged the claim on the ground that Apparel failed to plead that Williamson-Dickie's conduct was unlawful.[300] The district court, however, found that Apparel had properly pleaded a claim for tortious interference with existing contact because the conduct need not be unlawful.[301] Because Apparel pleaded that there was an existing contract and that Williamson-Dickie intentionally and willfully interfered with it, which proximately caused injury, Apparel had properly pleaded a claim for tortious interference with an existing contract.[302]

On the other hand, the district court dismissed Apparel's claim for tortious interference with prospective business relationship, which requires that the interference was independently tortious or unlawful, as discussed above.[303] Apparel relied on its allegations that Williamson-Dickie's conduct was unlawful because it was in breach of the implied covenant of good faith and fair dealing.[304] However, because there is no implied duty of good faith and fair dealing in a licensor-licensee relationship, the district court concluded that Apparel had failed to establish a tortious interference with prospective business relationship claim.[305]

V. STATUTORY CLAIMS

A. Texas Deceptive Trade Practices—Consumer Protection Act

In *Yumilicious II*, discussed above for its statute of limitations issues, the U.S. District Court for the Northern District of Texas determined that allegations of a technical violation of the Federal Trade Commission's Franchise Act (Franchise Rule), without more, cannot support a DTPA claim based on the theory of representations or omissions.[306] In this case, the franchisor filed suit against the franchisee, alleging that the franchisee breached two franchise agreements.[307] The franchisee then asserted counterclaims for, *inter alia*, DTPA violations, alleging that the franchisor had violated the Franchise Rule by providing a materially deficient franchise disclosure agreement with an earlier date.[308] The franchisor

298. *Id.* at *7–8.
299. *Id.* at *8.
300. *Id.*
301. *Id.*
302. *Id.* at *8–9.
303. *Id.* at *9–10.
304. *Id.* at *9.
305. *Id.* at *9–10.
306. *Yumilicious II*, No. 3:13-CV-4841-L, 2015 WL 1822877, at *6 (N.D. Tex. Apr. 22, 2015).
307. *Yumilicious I*, No. 3:13-CV-4841-L, 2014 WL 4055475, at *1 (N.D. Tex. Aug. 14, 2014).
308. *Id.* at *4, *8.

moved to dismiss the DTPA claim, which the district court initially granted on statute of limitations grounds.[309] When the franchisee moved for reconsideration of the order, the district court, instead, examined the sufficiency of the franchisee's DTPA allegations under §§ 17.46(b)(5) and 17.46(b)(24) of the Texas Business and Commerce Code.[310]

The franchisee alleged that the franchisor had made assurances that the franchise could expand nationally and that the franchisor was negotiating a contract for such expansion with a national distributor (but the franchisor ultimately did not consummate the deal).[311] The district court denied the franchisee's motion for reconsideration, finding that the franchisee had failed to allege that the franchisor knowingly made false statements or that the franchisee had detrimentally relied on those statements.[312] As it stood, the franchisee could only establish that the franchisor had committed a technical violation of the Franchise Rule when it failed to include all of the financial performance information previously given to the franchisee—allegations that were not sufficient to state a DTPA claim.[313] The holding in *Yumilicious II* serves as a reminder that "mere nondisclosure of material information is not enough to establish an actionable DTPA claim," and technical violations of the Franchise Rule, without evidence of intent or detrimental reliance, cannot support a DTPA claim.[314]

B. Bankruptcy Issues

In *Pizza Patron Inc. v. Saenz* (*In re Saenz*), the U.S. District Court for the Southern District of Texas considered indemnification and subrogation fraud claims under the statutory provisions related to non-dischargeable debt.[315] Here, Saenz, the franchisee who claimed to be a franchise representative, sold a Pizza Patron franchise to Gomez without Pizza Patron's permission.[316] Gomez eventually sued Saenz and Pizza Patron, alleging that Saenz acted as Pizza Patron's agent while committing fraud and other torts.[317] In response, Pizza Patron filed a Complaint for Determination of Non-dischargeable Debt under 11 U.S.C. §§ 523(a)(2) and 523(a)(4), seeking indemnification and subrogation from Saenz if it was found liable for Saenz's fraud.[318]

Pizza Patron pled direct fraud against Saenz, but the district court found that Pizza Patron had failed to allege sufficient facts to support the

309. *Id.* at *3–4.
310. *Yumilicious II*, 2015 WL 1822877, at *3–6; *see also supra*, Section II.G. Statute of Limitations.
311. *Yumilicious II*, 2015 WL 1822877, at *4.
312. *Id.* at *5, *7.
313. *Id.* at *6.
314. *Id.* at *4, *6 (quoting Century 21 Real Estate Corp. v. Hometown Real Estate Co., 890 S.W.2d 118, 126 (Tex. App.—Texarkana 1994, writ denied) (alteration in original).
315. Pizza Patron Inc. v. Saenz (*In re* Saenz), 515 B.R. 521, 523 (S.D. Tex. 2014).
316. *Id.* at 524.
317. *Id.* at 526.
318. *Id.* at 524, 526.

claim.[319] In addition, Pizza Patron alleged claims for derivative fraud based on Gomez's fraud claims against Saenz.[320] Saenz countered that Pizza Patron failed to state a claim because the movant creditor must have been the target of the alleged fraud.[321] The district court disagreed, finding that such an interpretation of the law would violate the underlying purpose of the Bankruptcy Code to prevent debtors from discharging any debts arising from their own fraud.[322] Instead, the district court ruled that Pizza Patron could assert a claim based on fraud committed against another person.[323] However, because Pizza Patron's derivative fraud claims were based on Gomez's fraud claims, the district court would allow Pizza Patron to amend its claim under § 523(a)(2) only if Gomez successfully pled his claim under the same section.[324] Because Gomez had already successfully stated a claim under § 523(a)(4), the district court upheld Pizza Patron's indemnification and subrogation claim under this section.[325]

Although Pizza Patron was ultimately dismissed from the suit,[326] *Pizza Patron* shows that claims for indemnification or subrogation may qualify as a non-dischargeable debt even when the debt is based on a liability resulting from a third party's fraud claim. In such cases, the statute does not require that the fraud be committed against the movant.[327] While this issue seems to have been scarcely considered in this district before this case, the court's holding falls in line with bankruptcy law's policy of protecting the "honest but unfortunate debtor."[328]

Next, *In re Simbaki, Ltd.* explored the statutory deadline for a creditor to file Chapter 11 plans of reorganization and the consequences of a court's failure to confirm such a plan within the statutory deadline.[329] *Simbaki* involved a small business debtor who filed a voluntary petition for Chapter 11 relief and entered a plan of reorganization.[330] When numerous parties filed objections, Simbaki withdrew the proposed plan.[331] Later, Simbaki's primary secured creditor asked for a continuance to propose an alternate plan.[332] Several parties opposed the continuance and moved to dismiss the case, arguing that because the statutory deadline for filing and confirming any plan of reorganization had passed, cause existed

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319. *Id.* at 526.
320. *Id.*
321. *Id.*
322. *Id.* at 527–28 (quoting Cohen v. de la Cruz, 523 U.S. 213, 217 (1998)).
323. *Id.* at 528.
324. *Id.* at 528, 532; *see also id.* at 532 (noting that the district court had previously granted Gomez leave to amend his claim under § 523(a)(2)).
325. *Id.* at 529.
326. Gomez v. Saenz, 534 B.R. 276, 281 (S.D. Tex. 2015).
327. *See Pizza Patron*, 515 B.R. at 526.
328. *See id.* at 526–28 (quoting *Cohen*, 523 U.S. at 217).
329. *See generally In re* Simbaki, Ltd., 522 B.R. 917 (Bankr. S.D. Tex. 2014).
330. *Id.* at 918–19.
331. *Id.* at 919.
332. *Id.*

under § 1112 to dismiss or convert the case.[333]

The U.S. Bankruptcy Court for the Southern District of Texas rejected this contention, holding that the 300-day deadline for filing a plan applied only to plans proposed by a debtor, not plans proposed by a creditor.[334] The bankruptcy court found that a review of the statute's legislative history and Congress' intent in amending the statute suggested that the statutory deadline was intended to apply only to plans offered by a debtor.[335]

Further, the bankruptcy court found that cause to dismiss the case did not exist based on the court's failure to confirm a plan within the 45-day statutory deadline.[336] Although the bankruptcy court acknowledged a nationwide split on the issue, the bankruptcy court rejected the contention that the plain language of the statute mandated dismissal or conversion if a plan was not confirmed before the deadline passed.[337] The bankruptcy court reasoned that while "[d]ismissing or converting the debtor's case in a situation where it failed to comply with a deadline is appropriate[, i]mposing a penalty on a debtor when a court did not approve their plan is a different proposition."[338]

The holding in *Simbaki* signals a reluctance to dismiss Chapter 11 cases where creditors participate in the reorganization process, even if debtors have missed a statutory deadline to file a reorganization plan and the court has missed its deadline to confirm. Other jurisdictions, however, mandate a dismissal after the confirmation deadline has passed, and the 300-day deadline for filing a plan is an ambiguous statute that is subject to different interpretations.[339] Thus, it is important for debtor and creditor parties alike to recognize the applicable law during the reorganization process.

VI. REMEDIES: DAMAGES AND INJUNCTIVE RELIEF

A. Punitive Damages

In *Yumicilious III*, discussed earlier for its fraud and misrepresentation claims, the U.S. District Court for the Northern District of Texas held that the defendants could not recover consequential and punitive damages because they had waived their right to recover those damages by signing guaranty agreements supporting franchise agreements that contained such a waiver.[340] Relying on a damages waiver provision in the franchise agreements signed by the defendant-franchisee, which the individual defendants personally guaranteed, Yumilicious argued an affirmative defense of waiver against defendants' request for consequential and

333. *Id.*
334. *Id.* at 920–21.
335. *Id.* at 921–22.
336. *Id.* at 923–24.
337. *Id.* at 924.
338. *Id.*
339. *See id.* at 921, 923.
340. *Yumilicious III*, No. 3:13-CV-4841-L, 2015 WL 1856729, at *8 (N.D. Tex. Apr. 23, 2015).

punitive damages.[341] Defendants maintained that the waiver provision did not apply to the individual defendants, because the provision was not conspicuous and the individual defendants were not parties to the franchise agreements.[342]

The district court determined that the damages waiver provision applied to both the defendant-franchisee and the individual defendants, even those defendants who had not signed both agreements.[343] The district court considered the conspicuousness of the waiver provision based on whether "a reasonable person against whom a clause is to operate ought to have noticed it."[344] The waiver provision contained a heading that appeared in all capitals, bold, and underlined typeface as well as text that appeared in all capitals and bold typeface.[345] The provision also stated in all capitals and boldface letters that the provision applied to the franchisee and the franchisee's principals.[346] Further, the guaranty agreements, signed by the individual defendants, referenced the specific subsection containing the waiver provision on the same page as language stating that the guarantors personally agreed to obligate themselves to the franchisee's agreements.[347] The district court also noted that one of the franchisee's principals and guarantors signed both the franchise and guaranty agreements.[348] Based on the language of the franchise and guaranty agreements, the court held that the damages waiver provision was conspicuous as a matter of law and that all the individual defendants, along with the franchisee, were bound to that provision through the terms of the guaranty agreements.[349]

Based on this holding, personal guarantors of a franchisee should take care in reviewing and signing franchise and guaranty agreements, especially with regards to waiver provisions. In particular, individual non-signatories of a franchise agreement may find themselves subject to all of the agreement's provisions even where only one principal-guarantor was a party and signatory to both the franchise and guaranty agreements.

B. Compensatory & Injunctive Relief

In *Choice Hotels International, Inc. v. Goldmark Hospitality, LLC*, the U.S. District Court for the Northern District of Texas denied Choice Hotels's summary judgment motions for monetary and injunctive relief despite having granted summary judgment on all claims against a party who

341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* at *9 (quoting Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 511 (Tex. 1993)).
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.* at *9–10.
349. *Id.* at *10.

was not directly involved in the franchise agreement.[350] Franchisor Choice Hotels entered into a franchise agreement with a franchisee that later defaulted and filed for bankruptcy.[351] Around the time that Choice Hotels terminated the franchise agreement, defendant Goldmark became owner of the franchisee's hotel property as the beneficiary of a deed of trust.[352] Goldmark then began to operate the hotel property under a new name but continued to display certain Choice Hotels trademarks and signs.[353] When Goldmark failed to remove two Choice Hotels signs, Choice Hotels sued Goldmark under the Lanham Act as well as under Texas law for common law trademark infringement and unfair competition.[354]

Although the district court granted Choice Hotels's motion for summary judgment for liability on all its claims, the district court rejected Choice Hotels' request for a permanent injunction, finding that certain disputed issues of material fact still existed.[355] To obtain permanent injunctive relief, Choice Hotels had to establish each of the following factors:

> (1) a substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to Choice Hotels outweighs the threatened harm . . . to Goldmark; and (4) that granting the preliminary injunction would not disserve the public interest.[356]

While Choice Hotels could establish actual success on the merits (as evidenced by the court's earlier findings), the district court found that Choice Hotels could not carry the heavy burden of supporting its request for a permanent injunction.[357] The district court held that Choice Hotels failed to prove that it faced a substantial threat of irreparable injury because Goldmark had covered up the disputed signs, removed other signs or paraphilia containing Choice Hotels's marks, and generally presented itself as an establishment not owned by Choice Hotels.[358] The district court found that these issues precluded Choice Hotels's summary judgment request for injunctive relief.[359]

Similarly, the district court held that Choice Hotels was not entitled to monetary damages because disputed issues of material fact remained.[360] While Choice Hotels sought Goldmark's profits during the time of infringement, Choice Hotels disputed the loss and accounting statement

350. Choice Hotels Int'l, Inc. v. Goldmark Hosp., LLC, No. 3:12-CV-0548-D, 2014 WL 642731, at *1 (N.D. Tex. Feb. 19, 2014).
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.* at *1–2.
355. *Id.* at *10–12.
356. *Id.* at *11.
357. *Id.* at *12.
358. *Id.*
359. *Id.*
360. *Id.* at *12–13.

that summarized Goldmark's profits.[361] Choice Hotels also sought actual damages in the form of reasonable royalties due under the franchise agreement.[362] Contrary to Goldmark's arguments, the district court held that Choice Hotels could obtain royalty payments from Goldmark, despite the fact that Goldmark had not previously entered into a licensing agreement with Choice Hotels.[363] The district court, however, ultimately held that Choice Hotels was not entitled to actual damages because it had not clearly established the royalty rate that should be used.[364]

Choice Hotels stands as another example of a case in which the court granted summary judgment as to liability, but denied summary judgment as to the remedies because it found that disputed issues of material fact remain.[365] Further, *Choice Hotels* is notable because the defendant was not a former franchisee, but rather the owner of a foreclosure deed on a property previously operated under a franchise. In this situation, where a defendant violates infringement statutes as a matter of circumstance and without intending to do so, a franchisor may face difficulties in obtaining injunctive or monetary remedies on summary judgment.

C. Attorneys' Fees

Meltzer/Austin Restaurant Corp. v. Benihana National Corp. addressed the question of whether a franchisor could recover attorneys' fees based on a provision requiring that the franchisee pay for costs incurred in enforcing the franchise agreement.[366] This case involved three separate suits based on Meltzer's franchise agreements with Benihana, which were later consolidated in the Western District of Texas.[367] Only one set of claims by Meltzer's San Antonio business survived until trial, where a jury ruled in Benihana's favor.[368] Benihana then sought to recover attorneys' fees incurred in bringing suit against Meltzer in Florida as well as defending against Meltzer's suit in Texas.[369] Benihana relied on a provision in the franchise agreement that obligated Meltzer to pay all costs, including attorneys' fees, incurred by Benihana "in connection with the enforcement" of certain sections of the agreement related to the franchisee's covenants and to the use of Benihana's intellectual property and confidential information.[370] Whether such contractual language obligated Meltzer to pay Benihana's attorneys' fees in the initiation and defense of

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361. *Id.* at *13.
362. *Id.* at *13–14.
363. *Id.* at *14; *see also id.* (citing Bos. Prof'l Hockey Ass'n, Inc. v. Dall. Cap & Emblem Mfg., Inc., 597 F.2d 71 (5th Cir. 1979)) ("[A] prior licensing arrangement is not a prerequisite to using a reasonable royalty method to calculate damages.").
364. *Id.*
365. *See also* Choice Hotels Int'l, Inc. v. Patel, 940 F. Supp. 2d 532 (S.D. Tex. 2013).
366. Meltzer/Austin Rest. Corp. v. Benihana Nat'l Corp., No. A-11-CV-542-AWA, 2014 WL 7157110, at *2 (W.D. Tex. Dec. 15, 2014). Haynes and Boone, LLP served as counsel for Benihana National Corporation in this matter.
367. *Id.* at *1.
368. *Id.*
369. *Id.* at *2.
370. *Id.*

suits depended on the definition of "enforcement," which the franchise agreement did not define.[371]

The U.S. District Court for the Western District of Texas held that Meltzer was not required to pay Benihana's attorneys' fees incurred in defending against Meltzer's suit, pointing to various cases in which courts interpreted similar contractual language.[372] Specifically, the district court pointed to cases that drew a distinction between a proactive stance (e.g. suing to compel a covenant or enforce a right) and a defensive stance (e.g. defending against a claim based on an agreement) and held that enforcement of an agreement fell only into the former category.[373] Ultimately, because enforcement did not include defense of a suit and Benihana had failed to include explicit language stating, the district court found that Benihana could not recover the attorneys' fees incurred in defending itself against Meltzer's suit.[374] The district court, however, held that Benihana was entitled to attorneys' fees incurred in bringing suit against Meltzer in Florida because that action sought to enforce certain provisions of the franchise agreement.[375]

The *Meltzer/Austin Restaurant* holding emphasizes the importance of drafting contractual language in a precise manner. In cases where courts have expanded the definition of "enforcement" to include the defense of an action, they have relied on other language in the agreement to guide their interpretation.[376] For example, one federal district court awarded attorneys' fees incurred in defense of a suit where the agreement required payment for attorneys' fees incurred in connection with the enforcement and protection of the agreement, because the court interpreted "protection" to include defense of a suit.[377] Because drafters are capable of writing clauses that explicitly award attorneys' fees in certain situations, courts generally do not interpret enforcement to mean anything beyond "to enforce."[378]

VII. CONCLUSION

This Survey period not only witnessed the Texas courts continuing to define procedural and substantive issues in the franchising context, but it also saw the Texas Legislature take affirmative steps to limit a franchisor's exposure to vicarious liability under the joint employer doctrine in response to recent National Labor Relations Board decisions.

371. *Id.* at *3.
372. *Id.* at *2–4 (citing Hous. Auth. of Champaign Cnty. v. Lyles, 918 N.E.2d 1276 (Ill. App. Ct. 2009); Carr v. Enoch Smith Co., 781 P.2d 1292 (Utah Ct. App. 1989); Gadsy v. Am. Golf Corp. of Cal., No. 2:10-cv-680-FtM-38CM, 2014 WL 5473555, at *5 (M.D. Fla. Oct. 28, 214)).
373. *See id.* at *3–4.
374. *Id.* at *4.
375. *Id.* at *4–5.
376. *Id.* at *3.
377. *Id.* (citing Bank of Am., N.A. v. Oberman, Tivoli & Pickert, Inc., 12 F. Supp. 3d 1092 (N.D. Ill. Jan. 22, 2014)).
378. *Id.* at *4.

Procedurally, *Great American* and *SGIC* remind franchisors that the requirements to establish personal jurisdiction over a defendant remain relatively stringent, and *Aguayo* and *Pacheco* provide worthwhile distinctions for applying the relatively low requirements for certifying a proposed class. *Gator Apple*, *Pritchett*, *Yumilicious I*, and *Yumilicious II* emphasize the importance of timing and intent behind franchise agreements as it relates to choice-of-law, forum selection clauses incorporated by reference, jury waivers in guaranty agreements, and statute of limitation issues related to DTPA counterclaims. In addition to cautioning franchisors that arbitration exemptions should be explicitly identified and should include specific language in the franchise agreement, *DXP* and *Allee* demonstrate Texas courts' inclination to enforce arbitration clauses that are reasonably broad in scope.

Although *New York Pizzeria* appears, at first glance, to weaken a franchisor's trademark protection of distinctive food flavors and trade dress protection for plating of dishes, the case underscores the importance of protecting recipes and other cooking secrets through effective nondisclosure and confidentiality agreements.

Texas law imposes extra-contractual duties of good faith and fair dealing where there is a special relationship between the parties. But Texas courts have found no special relationship between parties to a franchise agreement. *Williamson-Dickie* further notes that the implied covenant does not exist in a trademark license agreement since a licensor-licensee relationship is substantially similar to the franchisor-franchisee relationship. Accordingly, there can be no claim for tortious interference with prospective business when the conduct complained of is an alleged breach of the implied covenant of good faith and fair dealing.

Further, in the tort context, *Yumilicious III* stands for the proposition that the economic loss rule precludes recovery for fraud and misrepresentation claims tied directly to a franchise agreement. *BP Automotive* holds that filing an application for a franchise, presumably to compete with a competitor's application, does not constitute a prohibited act. Nor is the application an "existing contract" sufficient for a claim of tortious interference with existing contract.

Most notably, the Texas Legislature limited a franchisor's exposure to liability for claims made by a franchisee's employees. By restricting a franchisor's status as an employer or joint employer over those employees, a franchisor will be liable only if it exercises direct control over the employees beyond what is necessary to protect its brand. In *Domino's*, the court of appeals fleshed out the "control" element for analyzing vicarious liability in the franchising context and focused specifically on the franchise agreement. In addition, *EEOC v. Simbaki* makes it clear that franchisors should pay particular attention to any Title VII allegations because the named-party requirement may not ultimately be a defense to liability.

Yumilicious II reminds franchisors that the mere nondisclosure of material information does not give rise to an actionable DTPA claim and that technical violations of the Franchise Rule will not support a DTPA without evidence of intent or detrimental reliance. And in the bankruptcy context, *Pizza Patron* suggests indemnification or subrogation claims may qualify as non-dischargeable debt even if the debt is based on liability from a third-party's fraud claim, a holding that adheres to the general policy of protecting an honest but unfortunate debtor. Furthermore, *In re Simbaki* highlights how bankruptcy courts in this jurisdiction are reluctant to dismiss a Chapter 11 case if creditors participate in the reorganization process, even if the debtor and the court miss statutory deadlines to file and confirm the reorganization plan.

Finally, with respect to remedies, *Yumilicious III* serves as a reminder to personal guarantors of a franchise to carefully review both the franchise and guaranty agreements for waiver provisions because the right to recover consequential or punitive damages can be waived. *Choice Hotels* clarifies that summary judgment as to liability does not automatically result in summary judgment as to remedies where disputed issues of material fact remain, and injunctive relief may be especially difficult in the foreclosure context where a defendant has no intent to violate an infringement statute. Franchise attorneys should thoroughly examine *Meltzer* and its implicit instruction to precisely draft attorneys' fees provisions in franchise agreements. By avoiding seemingly ambiguous phrases, such as the "enforcement of the franchise agreement," drafters can ensure that attorneys' fees are awarded in specific situations.